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# Telemedicine: dos and don'ts to mitigate liability risk

Hans K. Bruhn, MHS

**The use of telemedicine tools has increased significantly due to the COVID-19 emergency and practice restrictions imposed by states. As restrictions are loosened, telemedicine is a cost effective and efficient way to render care to patients. Suggestions are offered for maintaining contact with patients, managing their expectations for care, and rendering care in a prudent and timely manner. By following these steps, professional liability risk (medical malpractice) can be mitigated.**

The COVID-19 pandemic has altered the way healthcare professionals provide care. What has *not* changed since practice restrictions were introduced is the duty of healthcare professionals to render care to their patients in a prudent and timely manner. Briefly stated, if a physician-patient relationship exists, an attempt to render care must be offered, or the patient must be referred to where care can be obtained. In these challenging times, telemedicine can assist healthcare professionals to meet their duty to treat patients while lowering the risk of contracting or spreading the virus.

The Center for Medicare & Medicaid Services (CMS) and various private insurers provide definitions of telemedicine that are primarily used for reimbursement purposes. The American Telemedicine Association (ATA) uses a broader definition, which encompasses existing telemedicine technology and how healthcare is delivered. The ATA defines telemedicine as "The use of medical information exchanged from one site to another via electronic communications to improve a patient's clinical health status. Telemedicine includes a growing variety of applications and services using two-way video, email, smartphones, wireless tools, and other forms of telecommunications technology." With these virtual tools, healthcare providers can continue to assess the need for care and convey the importance of care to patients. To mitigate liability risk, information gathered in a telemedicine visit needs to be maintained in the medical record in order to meet the standard of care. We present a few dos and don'ts regarding telemedicine to facilitate patient care while mitigating the risk of liability claims.

*Do stay connected and maintain the physician-patient relationship.*

The mandated temporary halt of nonurgent medical care during the COVID-19 pandemic has created detachment between patients and healthcare providers. This distance can contribute to the breakdown of communication and weaken mutual trust, which is vital in a physician-patient relationship. Keep in mind that this relationship should recognize that healthcare professionals are the more knowledgeable party in this relationship and therefore have a greater responsibility to educate a patient on health risks.

Widely used tools (such as telephone calls, emails, and texts) and more recent technology (video conferencing and diagnostic tools) allow healthcare professionals to continue to connect with patients and deliver care. As healthcare restrictions are eased, telemedicine can help practices gradually reopen in a cost-effective manner until patient revenue levels can support additional staffing. For example, pre- and post-appointment tasks and some diagnostic tests can be performed electronically.

*Don't wait for patients to contact you.*

It is incumbent upon healthcare professionals to initiate contact to remind patients that they need to follow up on known health conditions, such as glaucoma. If they are unwilling to use telemedicine tools and need follow-up care, they must be seen. The urgency of being seen is up to the medical professional to determine and communicate. Just as people use teleconference tools to stay connected with family and friends while sheltering-in-place, patients and staff can benefit from that same social connection. Video conferencing tools help maintain that link to a patient.

*Do utilize the services of your medical malpractice insurance company to help guide you on telemedicine.*

Contact your medical professional liability (MPL) insurance company to confirm that they extend coverage for care rendered via telemedicine. Most insurers provide coverage but require the healthcare professional to comply with state and federal regulations. Traditionally, providers must be licensed in the state in which the patient is located. Some relief on these laws has been enacted on account of the COVID-19 pandemic, and most states now have waived these licensure requirements or have provided exemptions for out-of-state physicians. The Federation of State Medical Boards (FSMB) maintains a list of states that are waiving in-state licensure requirements for telemedicine (<https://www.fsmb.org/advocacy/covid-19>). As of May 13, 2020, state licensure waivers have been issued by 49 states. Without these waivers, healthcare professionals should practice prudently and only treat patients who are located in the state(s) where they are

Author affiliations: Ophthalmic Mutual Insurance Company, San Francisco, California  
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Correspondence: Hans K. Bruhn, MHS, Risk Manager Ophthalmic Mutual Insurance Company OMIC, 655 Beach Street, San Francisco, CA 94109 (email: [hbruhn@omic.com](mailto:hbruhn@omic.com)).  
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licensed. Some patients have chosen to shelter in place in a state other than their usual residence. Those individuals need to be identified and directed to alternative sources to obtain care, as necessary. Confirming where a patient is located should now be an important checklist item in practice protocols.

*Don't assume that there are blanket exemptions or waivers in states where your patients are located.*

Keep in mind that COVID-19 conditions differ in each state, are fluid, and subject to change. Monitor those state laws for changes. Also, some states require a provider to conduct in-person examinations before telemedicine-specific treatment can be rendered. In the event of a claim, plaintiff attorneys will check to confirm you complied with state laws. Failure to comply can negatively impact the defense of a medical professional liability claim.

*Do integrate telemedicine in practice protocols and account for their limitations.*

Telemedicine tools are only as effective as the individuals who use them. Not all patients will be candidates for telemedicine, nor will they all be willing to participate. Others will assume that virtual visits are ineffective and will refuse to pay medical fees. Conversely, others will assume that these tools are equivalent to in-person examinations and may refuse to come into the office for an in-person examination. All these scenarios should be addressed in practice protocols so that necessary examinations or referrals are completed and care is not delayed.

Before integrating telemedicine into your practice, complete a full assessment of the tool to ensure it provides the quality of information you want and a positive patient experience. Here are considerations on telemedicine tool assessment:

- Does the tool provide useful data for healthcare professionals? Can the provider record a video session for documentation, and can diagnostic test results be put into the patient's medical record?
- What privacy protection features does the telemedicine tool provide, and do they comply with Health Insurance Portability and Accountability Act (HIPAA) regulations? The Department of Health and Human Services (HHS) Office for Civil Rights announced on March 17, 2020, that it is taking a more relaxed position on HIPAA enforcement of noncompliance with certain

HIPAA provisions related to telehealth services, but CMS advised that "covered entities must continue to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures."

- Be sure that your telemedicine practice protocols include *specific* accommodations for patients with special needs. The Americans with Disabilities Act (ADA) for title II (state and local government services) and title III (public accommodations and commercial facilities) requires practices to communicate effectively with people who have communication disabilities. The ADA has issued specific audio-visual requirements for individuals with special needs (<https://www.ada.gov/effective-comm.htm>).
- Proactively managing expectations is part of every encounter with patients. A well-executed informed consent process regarding telemedicine should be an integral part of practice protocols. Minor-aged patients are often brought to a provider for nonurgent acute medical care or health supervision visits by someone other than their custodial parent or guardian. These surrogates can be members of the child's extended family, such as a grandparent, aunt, noncustodial parent, stepparent, au pair, or nanny. Two types of consent forms should be used to document consent to treat minors: proxy consent and preauthorization to treat a minor. Ophthalmic Mutual Insurance Company (OMIC) offers these two consent forms on their website for use in your practice: <https://www.omic.com/consent-for-proxy-forms>. Check with your MPL insurance company for a telemedicine consent form that will help document this discussion with patients. OMIC provides a consent form on its website (<https://www.omic.com/telemedicine-consent-form>).
- Consider safety issues for patients and staff. For example, some practices have technicians join the physician on video conferencing sessions to both document care and provide a witness if there are allegations of inappropriate behavior.

*Don't forget that telemedicine is simply a set of technology-based tools used to practice medicine.*

Information obtained in telemedicine visits must be documented just like any other communication with a patient.